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OFFICE OF THE CLERK

In The Supreme Court Of The United States

October Term, 1996

Peter M. McDevitt,

Petitioner,

v.

Disciplinary Board of the Supreme Court
for the State of New Mexico;
Larry Ramirez, Chairman; Christina Armijo;
Michael D. Bustamante; Gregg W. Chase,
Charles W. Daniels; Patricia B. Murray;
Warren F. Reynolds; Alex Romero; Freddie J. Romero;
Sarah M. Singleton; Raymond Hamilton;
in their official capacities;
Richard L. Gerding,
Tom Udall, Attorney General,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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81PP

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the State, in promulgating Rule 16-707 of the Rules of Professional Conduct of the New Mexico Supreme Court, has met its burden of proof by directly advancing a substantial state interest in ensuring truthful lawyer advertising and that such interest cannot be furthered by a more limited restriction on commercial speech as set forth in Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980).

TABLE OF CONTENTS

Title Page	1
Question Presented for Review	2
Table of Contents	3
Table of Authorities	4
Opinions	4
Jurisdiction	5
Constitutional and Statutory Provisions	5
Statement of the Case	6
Reasons for Granting Petition	8
Conclusion	14
Appendix	17
Order and Judgment (10th Circuit)	1
Order and Opinion, United States District Court (D.N.M.)	14
Opinion and Order, United States District Court (D.N.M.)	42
Order, Supreme Court of New Mexico	53
Decision and Recommendation of Disciplinary Board	54
N.M. R. Prof'l Conduct 16-707	58

TABLE OF AUTHORITIES

Virginia Pharmacy Board v. Virginia Citizens Consumer Council
425 U.S. 748 (1976)

Bates v. State Bar of Arizona
433 U.S. 350 (1977)

Fred H. Edenfield, et. al., v. Scott Fane
597 U.S. 761 (1993)

Central Hudson Gas & Electric Corporation v. Public Service Commission
447 U.S. 557 (1980)

OPINIONS

Order and Judgment, Tenth Circuit Court of Appeals

Order and Memorandum Opinion, United States District Court (D.N.M.)

Memorandum Opinion and Order, United States District Court (D.N.M.)

Order, Supreme Court of New Mexico

Decision and Recommendation of the Disciplinary Board, Supreme Court, State of New Mexico

JURISDICTION

The Order and Judgment from which review is sought was entered March 3, 1997, United States Court of Appeals for the Tenth Circuit, No. 96-2094. Jurisdiction in the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, to petition the government for a redress of grievances. (U.S. Const. Amend. I)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equalprotection of the laws. (U.S. Const. Amend IV., Sec. 1.)

16-707. Evaluation by Legal Advertising Committee (N.M. R. Prof'l Conduct, 16-707 A-H)

STATEMENT OF THE CASE

There is no dispute between the parties as to material facts. Rule 16-707 of the Rules of Professional Conduct of the New Mexico Supreme Court requires a lawyer to submit public media or solicitation advertising to a Legal Advertising Committee, accompanied by a $50 fee. N.M. R. Prof'l Conduct 16-707(B). The advertisement must be reviewed by the Committee within 30 days, or be deemed approved. Within the 30 day period, If the committee finds the advertisement in violation of the rules, it may inform the lawyer that it finds the advertisement in question a violation of the rules and advise the lawyer that professional discipline may result. N.M.R. Prof'l Conduct 16-707(E,G). Plaintiff-Appellant declined to submit his print media advertising to the committee, raising the issue of commercially protected speech under the First Amendment. Disciplinary proceedings were invoked for non-compliance with Rule 16-707 and Plaintiff-Appellant was sanctioned with a reprimand, contingent on successfully completing one year of

probation. The terms of probation required the attorney to submit all advertising, exempt or non-exempt, for scrutiny. At the subsequent hearing, the Disciplinary Board refused to address the constitutional free speech issue. Plaintiff-Appellant's Petition in the New Mexico Supreme Court to review the Disciplinary Board decision was denied. Jurisdiction of the United States District Court (D.N.M.) was invoked under the provisions of the Civil Rights Act, 42 U.S.C., 1983 and the Declaratory Judgments Act, 28, U.S.C. 2201 & 2202. Plaintiff's Motion for Preliminary Injunction and subsequent Motion for Summary Judgment on the constitutional question were denied and final judgment entered March 25, 1996. Plaintiff presented the constitutional issue for review to the Tenth Circuit as a state burden of proof issue under the tenets of Central Hudson Gas & Elec Corp v. Public Service Commission of New York 447 U.S. 557 (1980). Appellate jurisdiction was invoked pursuant to 28 U.S.C. 1291. The Tenth Circuit affirmed the United States District Court (D.N.M.) decision March 3, 1997.

REASONS FOR GRANTING THE PETITION

The First Amendment, as applied to the States through the 14th Amendment, protects commercial speech from unwarranted governmental regulation. Virginia Pharmacy Board v. Virginia Citizens Consumer Council 425 U.S. 748, 762 (1976). People will perceive their own best interests only if they are well-enough informed, and the best means to that end is to open the channels of communication, not close them. Id. at 770. The present case is a challenge to the means used by the State of New Mexico, as delegated by its Supreme Court to a committee of lawyers and non-lawyers, to regulate lawyer advertising. Rules 16-706 and 16-107 of the N.M. R. Prof'l Conduct create an advertising committee to review prospective lawyer advertisements and delineate procedures for submission of advertisements with accompanying fees to defray the costs of committee review. Rule 16-707(G) grants authority to the committee to make a finding of non-compliance with the rules and advise the lawyer that continued dissemination of the advertisement may result in professional discipline.

The State has the burden of proof in meeting a constitutional challenge to regulation of commercial free speech. The State has the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem. (See Fred H. Edenfield et al. v. Scott Fane, 507 U.S. at 761 (1993). If the "protections afforded commercial speech are to retain their force, Zauderer, 471 U.S., at 648-649, we cannot allow rote invocation of the words "potentially misleading" to supplant the Board's burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Id. In Central Hudson Gas & Elec. Corp. v. Public Service Commission, 447 U.S. 557 (1980) the Court developed a four-part analysis for commercial speech cases. First there must be a determination whether the expression is protected by the First Amendment which means it must concern lawful activity and not be misleading. Id. at 567. There is no dispute between the

parties that Plaintiff-Appellant's advertising is constitutionally protected commercial speech.

The second prong of the analysis is a determination of whether the government interest in regulating commercial speech is substantial. Id. at 567. Commercial competition among lawyers is unrelated to the quality of the representation a lawyer provides an individual client. Each client's case is different. The nature of the professional attorney-client relationship is private and privileged. It cannot be regulated at the outset by evaluating print media advertising. In cases where the First Amendment protection of commercial speech applies, as in this one, an attorney advertisement can only be found to be truthful at the conclusion of one or more individual client/case relationships. New Mexico already had a Disciplinary Board to address and redress client complaints before the advertising rules were enacted. The Disciplinary Board process allows grievance filing by clients far more easily than commencing litigation against attorneys. Such grievances presume the lawyer at fault

until he or she proves otherwise. Regulating print media advertising before a lawyer represents a client, by a committee with a stated purpose of ensuring truthfulness in advertising, is superfluous and repetitive. The state has an interest in ensuring truthfulness in advertising, but given the uniqueness of the attorney-client relationship, attempting to define truth in advertising prior to the formation of the relationship with the client is not a primary and therefore substantial state interest. Public protection has been furthered by the scope and power of the Disciplinary Board over every aspect of alleged lawyer indiscretion and error. Disciplinary Board scrutiny presupposes an attorney-client realtionship and allows the public direct access to the Board. There is no proof by the state in this case that print media advertising even generates clients for lawyers, nor proof of a correlation between representation of a client by an attorney and print media advertising to inform clients of the lawyer's existence and services.

The proof offered by the state was a 1992 study on direct mail soliciation. Absent proof of a correlation between

print media and lawyer representation of clients, there is no substantial state interest shown.

Although the Central Hudson test has been satisfied by establishing constitutionally protected speech and the absence of a substantial state interest, the remaining two aspects of the four-part analysis will be addressed. The next determination is whether the regulation directly advances the governmental interest asserted. Central Hudson Gas & Elec. Corp. v. Public Service Commission, 447 U.S. 557, 567 (1980). Restraints on advertising are an ineffective way of determining shoddy work. Bates v. State Bar of Arizona, 433 U.S. 350, 378 (1977). The quality of a lawyer's representation is what is really at stake in here. The state's recited purpose of ensuring truthfulness in advertising, a purely commercial way to inform the public of lawyer services, does not by itself demonstrate any real harm to potential clients or that the restrictions to ensure that purpose alleviate any harm to a material degree. The State also has not shown that regulation of advertising protects the public from

incompetent or negligent representation. Therefore the means used, in this case another layer of bureaucracy at great cost, to evaulate lawyer advertising and initiate the procedure for censure and discipline of lawyers by the Disciplinary Board, does nothing beyond what the Disciplinary Board has already been doing to monitor client complaints against lawyers and initiate disciplinary proceedings, if necessary. In addition, by the time the disciplinary process and subsequent court challenges are over, a published advertisment can affect hundreds of potential clients. Emphasizing "directly", the advertising committee regulatory process cannot possibly directly advance governmental interest.

The final analyis of Central Hudson asks whether the regulation is more extensive than is necessary. As stated, there are already procedures in place to handle attorney-client grievances without the additional layer of the advertising committee. In the 1990's, the practice of law has become more commercial. Public media advertising is not the focal point for

the client or the lawyer - competent representation of the client is every diligent lawyer's and every client's goal. Therefore, regulation of constitutionally protected commerical speech in the form of public media advertising, absent proof of any direct contact with potential or actual clients, is more extensive than any state purpose it may be trying to serve. Lawyers who advertise in print media do not target indentified individuals as in direct-mail solicitation cases. Only after the attorney-client relationship is formed is the individual client affected by his or her lawyer. Opinions as to possible effects of direct-mail advertising on potential clients, forming the basis of the state's justification in this case, is irrelevant to public media advertising or the actual attorney-client relationship. The state's regulation is therefore more extensive than necessary to serve its interest in protecting the public.

CONCLUSION

The State of New Mexico failed to meet its burden of

proof to defeat Plaintiff-Appellant's constitutional right to commercial free speech as required by Central Hudson Gas & Electric Corp. v. Public Service Commission, 446 U.S. 557 (1980). There was no proof shown by the State that lawyer advertising determined or affected attorney-client relationships. There are comprehensive State Disciplinary Board procedures in place to protect actual clients from incompetent or negligent attorneys without the necessity of creating public media advertising regulations to allegedly protect a wide-ranging mass of potential clients. There is no regulation of constitutionally protected lawyer advertising that can be sufficiently specific to protect the public at large and allow access to information at the same time. For the reasons herein described, the Petitioner respectfully prays that the Supreme Court of the United States will grant and issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit as authorized by U.S. C. 1254.

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
March 3, 1997

Patrick Fisher
CLERK

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETER M. MCDEVITT,

Plaintiff- Appellant,

v.

No. 96-2094
(D.C. No. CIV
94-383) (D.N.M.)

DISCIPLINARY BOARD OF THE SUPREME COURT FOR THE STATE OF NEW MEXICO; LARRY RAMIREZ, Chairman; CHRISTINA ARMIJO; MICHAEL D. BUSTAMANTE; GREGG W. CHASE; CHARLES W. DANIELS; PATRICIA B. MURRAY; WARREN F. REYNOLDS; ALEX ROMERO; FREDDIE J. ROMERO; SARAH M. SINGLETON; RAYMOND HAMILTON; RICHARD L. GERDING, in their official capacities; TOM UDALL, Attorney-General,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before ANDERSON, KELLY, and LUCERO,
Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited un the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f) and 10th cir. R. 34.1.9. The case is therefore ordered submitted without an oral argument.

Plaintiff/Appellant Peter M. McDevitt appeals from the district court's order dismissing his complaint for injunctive and declaratory relief against defendants/appellees. We affirm.

Appellant is a licensed attorney in the State of New Meixoc. His primary area of practice has been representing consumer debtors in proceddings under chapters 7 and 13 of the United States Bankruptcy Code. He has advertised his legal

services in the yellow pages of various telephone directories and in various newspapers.

In 1992, the New Mexico Supreme Court adopted revised legal advertising rules. See SCRA 16-701 through 707 (1995 Repl.) (as amended, effective August 1, 1992). Rule 16-707(B) requires any lawyer who advertises services through any public medium to file a copy of the advertisement with the Legal Advertising committee of the Disciplinary Board (Committee) for evaluation of compliance with the legal advertising rules. The Rule further provides that the copy shall be filed either prior to or concurrently with the lawyer's first dissemination of the advertisement. See id. A filing fee of $50 per submission, payable to the disciplinary Board, must accompany the filing. SCRA 16-707(D)(4) (1995 Repl.) (as amended, effective August 1, 1992).

Appellant failed to submit certain advertisements to the Committee. The committee requested disciplinary counsel for the Disciplinary Board to commence disciplinary proceedings

against appellant for his failure to comply with the filing and fee payment requirements outlined above. Disciplinary proceedings were commenced against appeallant for violation of the filing and fee payment requirements. During the disciplinary proceedings, appellant attempted to raise a constitutional challenge to the Rules; however, the hearing panel appointed by the Disciplinary Board held that the panel was not empowered to consider the consitutional issues appellant raised.

The hearing panel found that appellant had violated Rule 16-707(B), and recommended that he be formally reprimanded and placed on probation. The disciplinary board adopted the hearing panel's recommendations, and recommended to the Supreme Court of New Mexico that appellant be issued a formal reprimand, but that imposition of the reprimand be deferred on the condiditon that appellant submit all of his advertisements to the Committee for review and that he comply with all other requirements contained in the Rules. Appellant filed a petition for review of the panel's decision with the Supreme Court of

New Mexico, which summarily denied the petition.

Appellant thereafter filed this action in federal district court, asserting that New Mexico's procedure for reviewing advertisements violated his First Amendment rights because (1) the requirement that he submit the advertisement to the committee constituted a prior restraint; (2) the submission procedure unduly burdened his right of commercial speech; and (3) the requirement that he pay a $50 fee was an unconstitutional tax on speech. The district court dismissed appellant's prior restraint claim, and granted summary judgment on the other two claims.*

---

* Appellant also asserved a claim, before the district court, that the submission requirement violated his First amendement rights because some Committee members were also attorneys in active practice who had a bias or inherent interest in rejecting advertisements from competing attorneys. He has not renewed this argument on appeal.

We review de novo the district court's order dismissing for failure to state a claim, see Kidd v. Taos Ski Valley, Inc., 88 F.3d 848, 854 (10th Cir. 1996), and its grant of summary

judgment, see David v. City & County of Denver, 101 F.3d 1344, 1355 (10th Cir. 1996). In reviewing summary judgment, we apply the same standards as the district court. See id. Factual disputes must be resolved and inferences drawn in favor of the nonmoving party. See id. "Summary judgment is warranted only if the uncontroverted material facts establish that the moving party is entitled to judgment as a matter of law." Id.

1. Prior restraint

Appellant contends that the advertising rules are constitutionally invalid because they impose a prior restraint on the content of his advertisements. His contention is without merit. "Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated." Cummins v. Campbell, 44 F.3d 847, 853 (10th cir. 1994) (emphasis added) (quoting O'Connor v. City and County of Denver, 894 F.2d 1210, 1220 (10th Cir. 1990)). Rule 16-707(B) allows appellant to submit his advertisement either in advance or concurrently with its first

publication. So long as he submits his advertisement concurrently with its first publication, any disapproval must inevitably occur not prior to, but following, the dissemination of the advertisement.

Moreover, the commitee is not empowered to restrain publication of a noncomplying advertisement. In the event it finds that an advertisement is not in compliance with the applicable rules, the Committee may only advise the attorney that continued publication may result in professional discipline, see Rule 16-707(G), and report the results of its investigation and make recommendations to the disciplinary counsel, see Rule 16-706(C).

2. Burden of submission procedure

Appellant argues that the submission procedure places an undue burden on his first Amendment right to advertise his legal services. While the courts generally accord speech by attorneys on public issues and matters of legal representation the strongest protections the constitution has to offer, a lesser degree of

protection is reserved for purely commercial advertising. See Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2381 (1995). Attorney standards and conduct have traditionally been subject to extensive regulation by the States, making it particularly appropriate to apply only limited scrutiny to state regulations concerning attorney advertising. See id. In analyzing such restrictions, the courts apply "intermediate" scrutiny, using the framework set for in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980). See Went for it, Inc., 115 S. Ct. at 2375-76.

Under Central Hudson, courts apply a four-part analysis to regulation of commercial speech. First, the court determines whether the expression is protected by the First Amendment. Central Hudson, 447 U.S. at 566. The government may freely regulate commercial communications which are misleading or related to unlawful activity. See id. at 563-64. Commercial speech which falls into neither of these categories may be regulated only if the government satisfies the three remaining

portions of the test. The government must assert a substantial interest to be achieved by the restriction. Any restriction must directly advance the state interest involved. Finally, the regulation must be narrowly drawn. See id. At 564-66; see also Went For It, Inc., 115 S. Ct. At 2376.

The state here asserts its interest in ensuring that the public receives trutful, relevant and meaningful information regarding its need for attorneys, the availability of legal services and the cost of such services. This interst is substantial. See Edenfield v. Fane, 507 U.S. 761, 769 (1993). However, as the challenged regulation impacts both truthful and deceptive or inaccurate speech by requiring that all advertisements be filed, the state must also satify the remaining two elements of the Central Hudson test. See Edenfield. 507 U.S. at 768-9.

To satisfy the third element of the Central Hudson test, the state must show a real harm to its asserted interest which the restriction will alleviate to a material degree. See Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592 (1995). The state

presented a summary of evidence gathered by its Task Force Committee concerning public attitudes toward attorney advertising, discussing studies which show that the public's regard for the trustworthiness, honesty and professionalism of lawyers has been adversely affected by attorney advertising. The Task force Commitee studied various rules that have been proposed in other states to regulate attorney advertising, and with considerable participation by the State Bar Commissioners, New Mexico attorneys, and the New Mexico Supreme Court, and an opportunity of public comment, it develped its own rules which it claims are designed to foster rational, intelligent and voluntary decision-making on the part of the public concerning legal services.

The Supreme Court has implicitly endorsed the ability of supervisory filing and review systems such as the one now in use in New Mexico to alleviate harms associated with attorney advertising. Moreover, the court has noted that a filing system is a narrowly-tailored means for addressing such harms. In

Shapero v. Kentucky Bar Association, 486 U.S. 466, 476 (1988), the Court, in discussing direct-mail solicitation, noted as follows:

> The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses. (citations omitted)

See also In re R.M.J., 455 U.S. 191, 206 (1982) (suggesting a system of filing all general mailings with the Advisory Committee as a "less restrictive path" for ensuring supervision). We conclude that the remaining elements of the Central Hudson test are met here.*

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* Appellant argues that the state's use of a newspaper clipping service would provide a less intrusive method of supervising lawyer advertising. He has submitted no evidence on either the costs or feasibility of using a clipping service. He does not explain how a clipping service would provide a good substitute for several requirements found in the current rule: that attorneys submit a copy of the advertisement in the form in which it is to be disseminated, including videotapes or audiotapes, that they file a transcript in the event that the

advertisement is transmitted by means of audio or view media, and that they detail the anticipated frequency or use of the advertisement and the time period during which it is to be run. See Rule 16-707(D).

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3. Payment of filing fee

Finally, appellant argues that the requirement that he pay a $50 fee to the Disciplinary Board for each submission of advertising for review constitutes an unconstitutional tax on speech. Rule 16-707(D)(4) specifically provideds that the filing fee will be used solely to defray the cost of administering the Rules. A fee of this sort, which is used to meet expenses incident to the administration of a regulatory statute governing exercise of a constitutional right, does not constitute an unconstitutional infringement of that right. See, e.g., Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941) (upholding license fee on parade).

The judgment of the United States District court for the District of New Mexico is AFFIRMED.

Entered for the Court

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Filed
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PETER M. MCDEVITT,

Plaintiff,

v. *Civ. No.94-0383 BB/WWD*

DISCIPLINARY BOARD OF THE SUPREME COURT FOR THE DISTRICT OF NEW MEXICO, and LARRY RAMIREZ, CHRISTINA ARMIJO, MICHAEL BUSTAMANTE, GREGG CHASE, CHARLES DANNIELS, PATRICIA MURRAY, WARREN REYNOLDS, ALEX ROMERO, SARAH SINGLETON, RAYMOND HAMILTON, RICHARD GERDING, and TOM UDALL in their official capacities,

Defendants.

ORDER

A Memorandum Opinion was entered this date.

IT IS THEREFORE ORDERED that:

1. Defendants' June 20, 1994 motion to dismiss complaint for lack of ripeness for adjudication (Doc. 17) be, and hereby is, ***DENIED;***

2. Defendants' December 28, 1994 motion for failure to state a claim or for summary judgment (Doc. 60) be, and hereby is, ***GRANTED, AND PLAINTIFF'S COMPLAINT IS HEREBY DISMISSED IN ITS ENTIRETY;*** *and*

3. Plaintiff's June 9, 1995 motion for summary judgment (Doc. 74) be, and hereby is, ***DENIED.***

DATED March 25, 1996.

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
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PETER M. McDEVITT,

Plaintiff,

v. CIV. No.94-0383 BB/WWD

DISCIPLINARY BOARD OF THE SUPREME COURT FOR THE STATE OF NEW MEXICO, and LARRY RAMIREZ, CHRISTINA ARMIJO, MICHAEL BUSTAMANTE, GREGG CHASE, CHARLES DANIELS, PATRICIA MURRAY, WARREN REYNOLDS, ALEX ROMERO, SARAH SINGLETON, RAYMOND HALMITON, RICHARD GERDING, and TOM UDALL, in their official capacities,

Defendants.

MEMORANDUM OPINION

This Opinion addresses three pending motions. The Court has reviewed the submissions of the parties and the relevant law, and for the reasons set forth below, finds that (1) Defendants' June 20, 1994 motion to dismiss case for lack of ripeness for adjudication (Doc. 17) should be **DENIED,** (2) Defendants' December 28, 1994 motion to dismiss for

failure to state a claim or for summary judgment (Doc. 60) should be **GRANTED,** and (3) Plaintiff's June 9, 1995 motion for summary judgment (Doc. 74) should be **DENIED.**

I. Facts and Procedural History

The parties do not dispute the material facts of this case. Rule 16-707 of the Rules of Professional Conduct of the New Mexico Supreme Court requires any lawyer advertising his or her services through public media or written solicitation to file a copy of each such advertisement, or revision thereof, with the Legal Advertising Committee ("Committee).* N.M. R. Prof'l Conduct 16-707 (Michie 1991 & Supp. 1994). The lawyer must file each advertisement prior to or concurrently with its first dissemination, and must accompany the filing with a fee of $50.00, and with information regarding all media in which the

* The Committee is an arm of the Disciplinary Board of the New Mexico Surpreme Court, and is composed of six lawyers and four non-lawyers. N.M. R. Prof'l Conduct 16-706(A).

advertisement will appear and the anticipated frequency and duration of the advertisement's use. N.M. R. Prof'l Conduct 16-707(B), (D).

The Committee must evaluate all filings for compliance with the Rules of Professional Conduct within thirty days of receiving them. N.M. R. Prof'l Conduct 16-707(E). Within the thirty-day period, the Committee may inform the lawyer that it finds the advertisement in violation of the Rules and advise the lawyer that dissemination may result in professional discipline. N.M. R. Prof'l Conduct 16-707(E), (G). The Committee must report any finding of violation to the Disciplinary Board Counsel. N.M. R. Prof'l Conduct 16-707(C). If the Committee does not communicate with the lawyer regrading his advertisement within thirty days of filing, the advertisement is deemed approved. N.M.R. Prof'l Conduct 16-707(E).

Plaintiff has practiced law in New Mexico since 1966 and has advertised in telephone directories and newspapers.

When Rule 16-707 became effective, Plaintiff refused to submit his proposed advertisements to the Committe, maintaining that Rule 16-707 violated his First Amendment right to free speech. The Committee therefore found Plaintiff to be in violation of the rule, and referred the matter to the Disciplinary Board Counsel. Counsel brought disciplinary proceedings, and after a hearing, the Board found Plaintiff to be in violation of Rule 16-707 and sanctioned him with a formal reprimand. However, the Board deferred the sanction on the condition that Plaintiff fully comply with the rule in the future. Plaintiff filed a petition for review with the New Mexico Surpreme Court, which was denied. At each stage of the proceedings, Plaintiff unsuccessfully raised or attempted to raise the argument that Rule 16-707 violated the First Amendment. Plaintiff filed the present action for declaratory judgment and injunctive relief on April 13, 1994, asking that Rule 16-707 be declared unconstitutional and that Defendants be

enjoined from enforcing it against Plaintiff.

Defendants have filed two dispositive motions in this matter. On June 20, 1994, Defendants moved to dismiss Plaintiff's complaint for lack of ripeness for adjudication, and on December 28, 1994, Defendants moved to dismiss Plaintiff's complaint for failure to state claim or for summary judgment. Likewise, on June 9, 1995, Plaintiff moved for summary judgment. These three motions are now before the Court.

II. Analysis

The Court may not grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) unless "it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." Maez v. Mountain States Tel. & Tel., Inc.,54 F.3d 1488, 1496 (10th Cir. 1995). The Court must "accept all well-pleaded allegations as true,: id., and "indulge all reasonable inferences in favor of the plaintiff." Weatherhead v. Globe

Int'l, Inc., 832 F 2d 1226, 1228 (10th Cir. 1987).

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 52 F3d 1522, 1527 (10th Cir. 1995) (quoting Fed. R. Civ. P. 56(c)). The Court must "view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment." Eaton v. Jarvis Prods. Corp., 965 F2d 922, 925 (10th Cir. 1992). Furthermore, for issues on which the movant will bear the burden of proof at trial, the movant "must show affirmatively the absence of a genuine issue of material fact....The moving party must show that, on all the essential elements of its case on which it bears the burden of proof at tiral, no reasonable jury could find for the non-moving party." Fitzpatrick v. City of Atlanta, 2 F.3d 1112,

1115 (11th Cir. 1993) (emphasis omitted). The Court will consider the parties' motions in light of these standards.

A. Defendants' June 20, 1994 Motion to Dismiss for Lack of Ripeness

In their June 20, 1994 motion to dismiss, Defendants argue that Plaintiff's action is not ripe for adjudication becasue Plaintiff has not yet presented any of his advertisements to the Committee, and the Committee has not yet determined whether Plaintiff's advertisements may propertly be disseminated. The United States Supreme Court set forth the standards to determine ripeness in this context in Abbot Laboratories v. Gardner, 387 U.S. 136 (1967). According to the Court, the "basic rational [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." Id. at 148.

In determining ripeness, federal courts are to consider "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id.. at 149.

Factors indicating the fitness of an issue for judicial decision include

> whether the agency action is final; whether the issue presented for decision is one of law which requires no further factual development; and whether further administrative action is needed to clarify the agency's position, for example, when the challenged prescription is discretionary so that it is unclear if, when or how the agency will employ it.

Action Alliance of Senior Citizens v. Heckler, 789 F2d 931, 940 (D.C. Cir. 1986). These factors clearly indicate that Plaintiff's action raises issues fit for judicial decision. First, Plaintiff was subject to final agency action. The Committee and the Disciplinary Board determined that Plaintiff violated Rule 16-707. The Board therefore formally reprimanded Plaintiff but deferred the sanction on the sole condition that Plaintiff file all of his advertisements with the Committe in the future, including advertisements normally exempt from

Rule 16-707. The New Mexico Supreme Court subsequently denied Plaintiff's petition for review of the Board's decision. Plaintiff has no further avenue of appeal.

The second criteria is also satisfied because the issues Plaintiff raises in his complaint require no further factual development. Defendants disagree, claiming that before Plaintiff's claims will be ripe, Plaintiff must submit all his advertisements to the Committee and allow the Committee to determine whether the advertisements violate substantive rules. Defendants contend that the case will somehow be rendered moot if the Committee finds Plaintiff's advertisements to be proper.

Defendants misunderstand Plaintiff's claims. Plaintiff does not allege that the substantive rules governing his advertisements are unconstitutional. Cf. Felmeister v. Office of Attorney Ethics, 856 F2d 529, 535-37 (3rd Cir. 1988) (plaintiffs claimed substantive attorney advertising rules were unconstitutional but placed no advertisements that violated

the rules; plaintiff's claim was not ripe until "it was shown that plaintiffs wished to engage in an activity that would be prohibited under the revised attorney advertising rule") Rather, Plaintiff alleges that the *procedural* requirements of Rule 16-707 are unconstitutional. The Committee and the Disciplinary Board have determined that Plaintiff's advertisements are not exempt under rule 16-707(C) and thus are subject to the procedural requirements to which Plaintiff objects. Plaintiff has failed to comply with those requirements, for which he has been subject to discipline. Furthermore, Plaintiff faces formal reprimand if he does not comply with the requirements in the future. Without subjecting himself to additional punishment, then, Plaintiff can produce no further factual development. See Sexton v. Arkansas Sup. Ct. Comm. on Prof'l Conduct, 725 F. Supp. 1051, 1052 (W.D. Ark. 1989) (plaintiff's constitutional claim ripe where plaintiff was suspended from practice but supreme court stayed suspension until United States

Suprmeme Court ruled on plaintiff's appeal.

Third, no further administrative action is needed to clarify the agency's position regarding Rule 16-707. The Committee, the Disciplinary Board, and the New Mexico Supreme Court have all determined that Plaintiff violated the rule, and have rejected or refused to consider Plaintiff's argument that the rule is unconstitutional. They have also demonstrated their intention to enforce the rule against Plaintiff in future. Defendants point to nothing in the record to suggesst that "the challenged prescription is discretionary so that it is unclear if, when or how the agency will employ it." Action Alliance of Senior Citizens, 789 F.2d at 490.

In determining ripeness, the court must also consider the hardship Plaintiff will suffer should the Court decline to hear this case. Abbott Labs, 387 U.S. at 149. Until the Court rules on Plaintiff's claims, Plaintiff will face an unpalatable choice; submit to a rule he believes to be

unconstitutional, or suffer addtional discipline for his failure to comply with such rule. Courts have been reluctant to present plaintiffs with such a choice in the First Amendment context, where the mere threat of discipline may chill the exercise of First Amendment rights. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985) ("Deferred adjudication would produce tempered speech without assisting in resolution of the controversy."), cert. denied, 475 U.S. 1001 (1986); Planned Parentood Ass'n v. Kempiners, 700 F.2d 1115, 1122 (7th Cir. 1983) (Cudahy, J., concurring) ("Requirements of ripeness are less strictly construed in the first amendment context due to the chilling effect on protected expression which delay might produce."). For these reasons, the Court will deny Defendants' motion to dismiss for lack of ripeness.

B. Defendants' December 28, 1994 Motion to Dismiss for Failure to State a Claim or for Summary Judgment and Plaintiff's June 9, 1995 Motion for Summary

Judgment

In his complaint and his motion for summary judgment, Plaintiff claims that Rule 16-707 violates the First Amendment to the United States Constitution* as a prior restraint, an unduly burdensome regulation of commercial speech, and a tax on speech. He also argues that the Committee is inherently biased and therefore its composition is unconstitutional. N.M.R. Prof'l Conduct 16-706(A). Defendants respond that Plaintiff's allegations fail to state a claim on which relief can be granted, Fed. R. Civ. P. 12(b)(6), or, in the alternative, assert that they are entitled to summary judgment on Plaintiff's claims.

Regarding Plaintiff's contention that Rule 16-707 constitutes an unconstitutional prior restraint, "governmental

** The First Amendment to the United States Constitution states in pertinent part that "Congress shall make no law...abridging the freedom of speech, or of the press..." U.S. Const. amend. I.*

action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated." Cummins v. Campbell, 44 F.3d 847, 853 (10th Cir. 1994) (quotation omitted); Texans Against Censorship, Inc. v. State Bar, 888 F. Supp., 1328, 1266 (E.D. Tex. 1995) ("The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." (quoting Alexander v. United States, 509 U.S. 544, 113 S. Ct. 2766, 2771 (1993)). Plaintiff argues that Rule 16-707 constitutes a prior restraint because it "requires him to obtain prior approval for...expressive activities." Alexander, 113 S. Ct. at 2771.

Plaintiff's argument is unpersuasive. First, Plaintiff may clearly disseminate his advertisements concurrently with the required filing. N.M.R. Prof'l Conduct 16-707(B). If Plaintiff chooses to do so, the Committee's approval or disapproval must inevitably occur not prior to, but following,

the advertisements' dissemination. Second, the Committee's "approval" or "disapproval" of an advertisement is in fact nothing more than a recommendation. N.M.R. Prof'l Conduct 16-707(G). The Committee has no power to restrain advertisements, but may only refer them to the Disciplinary Board for further action. See Texans Against Censorship, Inc., 888 F. Supp. at 1366 (holding that virtually identical Texas rule was not prior restraint because rule did not "empower the Review Committee prospectively to enjoin, or otherwise forbid, a lawyer from advertising or soliciting in any manner the lawyer chose"). * For these reasons, "to accept [Plaintiff's] argument would virtually obliterate the distinction, solidly grounded in our cases,

* *The court in Texans Against Censorship, Inc. also determined that the rule in question did not constitute an "informal" prior restraint under Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). Texans Against Censhorship, Inc., 888 F. Supps. at 1367-68. The Court declines to address this issue because Plaintiff has not raised this argument in opposition to Rule 16-707. However, the Court notes that the reasoning of the court in Texans Against Censorhip, Inc., on this issue certainly appears sound.*

between prior restraints and susequent punishments." Alexander, 113 S. Ct. at 2771. The Court will therefore dismiss Plaintiff's claims based on this theory.

The Court will next consider Plaintiff's claim that Rules 16-706 and 16-707 violate the First Amendment because the Committee is inherently biased. According to Plaintiff, the Committee is biased becasue a majority of its members are practicing lawyers and thus potential competitors of Plaintiff. See N.M.R. Prof'l Conduct 16-606(A) (Legal Advertising Committee to be composed of six lawyers and four nonlawyers). The lawyers on the Committee, Plaintiff contends, will seek to develop their own practices at the expense of the lawyers submitting advertisements by unfairly finding the advertisements untruthful or misleading.

Whether Plaintiff's contention is true is irrelevant, because, as discussed *supra* , the Committee can exert no actual control over Plaintiff's speech. According to Rule 16-

707(G), even if the Committee finds an advertisement to be untruthful or misleading, it can neither restrain the advertisement nor punish the advertising lawyer. N.M.R. Prof'l Conduct 16-707(G). Rather, it can only refer the advertisement to the Disciplinary Board, which must then make its own determination regarding the advertisement. N.M.R. Prof'l Conduct 16-706(C)(2). The Court will therefore dismiss Plaintiff's claim on this basis.

The Court must aslo consider Plaintiff's claim that Rule 16-707 is an unduly burdensome regulation of commercial speech. "Lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection." Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2375 (1995). This protection, however, is not unlimited: the courts engage in "intermediate scrutiny of restrictions on commercial speech, analysing them under the framework set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980). "

Went For It, Inc., 115 S. Ct. at 2375-76. Specifically, the government may only regulate commecial speech that concerns lawful activity and is not misleading "if [it] satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn." Id. at 2376 (internal quotation omitted); Lamphere & Urbaniak v. State of Colorado, 21 F.3d 1508, 1513-14 (10th Cir.), cert. denied, 115 S. Ct. 638 (1994). Finally, "it is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Edenfeld v. Fane, 113 S. Ct. 1792, 1800 (1993) (internal quotation omitted).

In his complaint, Plaintiff alleges that Rule 16-707 "does not further any substantial interest of the State of New Mexico." (Pl.'s compl. paragraph 16). He also asserts that

the rule is not narrowly drawn, and that "any substantial state interest that can be set forth by the State of New Mexico, including the prevention of deceptive advertising, can be satisfied by the requirement set forth in Rule 16-702 which requires an attorney to keep a copy of an advertisment, with a written record of each publication for five [sic] (5) years following the date of last publication.") (Id., paragraph 17); see Went For It, Inc., 115 S. Ct. at 2375 (citing Central Hudson Gas & Elec. Corp., 447 U.S. at 557). These allegations state a claim under Federal Rule of Civil Procedure 12(b)(6). However, in view of the parties' respective motions for summary judgment, the Court must also consider whether Rule 16-707 is constitutional as a matter of law.

First the Court will accept Defendants' proffered substantial state interest, that of ensuring the truthfulness and accuracy of attorney advertising, because "there is no qeustion that [the state's] interest in ensuring the accuracy

of commercial information in the marketplace is substantial." Edenfeld, 113 S. Ct. at 1799. Next, the Court finds that Defendants have established as a matter of law that Rule 16-707 directly and materially advances this state interest and is narrowly drawn. Went For It, Inc., 115 S. Ct. at 2380. As the Texans Against Censorship, Inc. court justly observed,

> a filing system provides the state bar [with] an effective oversight procedure to prevent consumer deception. One advantage of a filing system is that the state bar is not required to rely on consumers, who may not have enough information about the legal system in general, or a particular lawyer, to detect false or misleading advertising from lawyers. The state bar will not be forced to rely...on consumers, to find deceptive advertising or misleading solicitation letters. Instead the filing process will enable the state bar itself to winnow false or deceptive advertising from truthful advertising.

888 F. Supp. at 1364.

Further, the Supreme Court in Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988), approved in dicta a filing system such as that imposed by Rule 16-707. In considering the constitutionality of a state regulation prohibiting attorneys from sending targeted, direct-mail solicitation

letters, the Shapero court observed that

> merely because target, direct-mail soliciation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. The State can regulate such abuses and minimize mistakes through *far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agaency,* giving the State ample opportunity to supervise mailings and penalize actual abuses.

Id. at 476 (emphasis added) (internal citations omitted); see also In re R.M.J., 445 U.S. 191, 206 (1982) (noting that filing requirement of general mailings is less restrictive than outright ban on such mailings); Central Hudson, 447 U.S. at 571 n.13 (suggesting that system of "previewing advertising campaigns" might be appropriate regulation of commercial speech). While the Supreme Court's language, standing alone, is not enought to establish that Rule 16-707 is constitutional, it does reinforce this Court's conclusion to that effect. Defendants' motion for summary judgment on this issue is therefore granted.

Finally, Plaintiff argues that the $50.00 filing fee

imposed by Rule 16-707 is an unconstitutional tax on speech. "While the exercise of consitutionally protected activities may not be taxed...fees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible." National Awareness Fdn. v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995) (internal quotation omitted). Defendants have offered uncontroverted evidence demonstrating that the $50.00 fee is not a revenue tax, but rather is used only to "meet the expenses incident to the administration" of Rules 16-706 and 16-707. Id.; (Defs.' Supplement Defs.' Mot. Summ. J. Ex. 5, Aff. Rebecca Houston). In fact according to this uncontroverted evidence, the filing fee is so far from generating revenue that "in no year since the inception of the Legal Advertising Committee have the fees received by the Committee for submitted advertisements fully covered the expenses of

administering the commitee's work" (Defs.' Supplement Defs'Mot. Summ. J. Ex. 5, Aff. Rebecca Houston, paragaph 7). The Court will therefore grant Defendants' motion for summary judgment on this issue.

Because the court is granting Defendants' motion to dismiss, or, in the alternative, motion for summary judgment on all of Plaintiff's claims, Plaintiff's motion for summary judgment on these claims is denied.

III. Conclusion

The Court denies Defendants' June 20, 1995 motion to dismiss Plaintiff's complaint for lack of ripeness for adjudication. The court finds that Plaintiff's action clearly raises issues legally adequate to serve as the basis for judicial decision, and that Plaintiff would suffer hardship should the Court decline to hear his case.

However, the Court will grant Defendants' December 28, 1994 motion to dismiss for failure to state a claim or for summary judgment. First, the Court rejects

Plaintiff's contention that Rule 16-707 constitutes an unconstitutional prior restraint, and will dismiss Plaintiff's claim based on this contention. Rule 16-707 does not constitute a prior restraint because it allows lawyers to file advertisements concurrently with, and not prior to, dissemination of the advertisements if they choose, and because the rule does not authorize the committee to restrain advertisements, but only to refer them to the Disciplinary Board for further action.

Second, the Court will dismiss Plaintiff's claim that Rules 16-706 and 16-707 violate the first Amendment because the committee is inherently biased. Whether the Committee is biased is irrelevant, because it has no power to restrain or punish Plaintiff's speech.

Third, the court will grant Defendants' motion for summary judgment on Plaintiff's claim that Rule 16-707 unconstitutionlly regulates commercial speech. The Court accepts Defendants' proffered substantial state interest, that

of ensuring the truthfulness and accuracy of attorney advertising, and finds that Defendants have affimatively shown as a matter of law that Rule 16-707 directly and materially advances this state interest and is narrowly drawn.

Finally, the Court finds as a matter of law that the $50.00 fee is not a revenue tax, but rather is a means to meet the expenses incident to the administration of Rule 16-707. The Court will therefore grant Defendants' motion for summary judgment on this issue.

Further, for the reasons listed *supra*, the Court will deny Plaintiff's motion for summary judgment.

An Order in accordance with this Memorandum Opinion will issue.

DATED March 25, 1996

/s/

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
U.S. DIST. CT.
ALBUQUERQUE, NM
MAR 24, 1995
CLERK

PETER M. McDEVITT,

Plaintiff,

vs. No.CIV 94-0383 JB

THE MEMBERS OF THE
DISCIPLINARY BOARD OF
THE SUPREME COURT OF
THE STATE OF NEW MEXICO,
in their official capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the court on Plaintiff's May 27, 1994 motion for a preliminary injunction. The Court, having reviewed the pleadings, the submissions of the parties and the relevant law, and being otherwise fully advised in the premises, finds Plaintiff's motion is not well taken and is denied.

The parties do not dispute the material facts of this case.

Rule 16-707 of the Rules of Professional Conduct of the New Mexico Supreme Court requires any lawyer advertising his or her services through public media or written solicitation to file a copy of each such advertisement, or revision thereof, with the Legal Advertising Committee, a committee under the Disciplinary board of the New Mexico Supreme Court. N.M. Stat. Ann. 16-707 (Michie 1991 & Supp. 1994). The lawyer must file each advertisement prior to or concurrently with its first dissemination, and must accompany the filing with a fee of $50.00 and information regarding all media in which the advertisement will appear and the anticipated frequency and duration of the advertisement's use. N.M. Stat. Ann. 16-707(B) (D). The Legal Advertising Committee must evaluate all filings for compliance with the Rules of Professional Conduct within thirty days of receiving them. N.M. Stat. Ann. 16-707(E). Within the thirty-day period, the Committee may inform the lawyer that it finds the advertisement in violation of the Rule and advise the lawyer that dissemination may result in professional

discipline. N.M. Stat. Ann 16-707(E), (G). The Committee must in turn report any findings of violations to the Disciplinary Board Counsel. N.M. Stat. Ann 16-707(C).

Plaintiff has practiced law in New Mexico since 1966 and and has advertised in telephone directories and newspapers. When Rule 16-707 became effective, Plaintiff refused to submit his proposed advertisements to the Committee, maintaining that the requirement to do so violated his First Amendment right to free speech. The committee therefore found Plaintiff to be in violation of the rule, and referred the matter to the Disciplinary Board Counsel. Counsel brought disciplinary proceedings, and, after a hearing, the Board found Plaintiff to be in violation of Rule 16-707 and sanctioned him with a formal reprimand. However, the Board deferred the sanction on the condition that Plaintiff fully comply with the rule in the future. Plaintiff filed a petition for review with the New Mexico Supreme Court, which the court denied. At each stage of the proceedings, Plaintiff unsuccessfully raised the argument that Rule 16-707 violated the

First Amendment. Plaintiff filed this present action for declaratory judgment and injunctive relief, asking that Rule 16-707 be declared unconstitutional and that Defendants be enjoined from enforcing it against Plaintiff. Plaintiff has now moved for a preliminary injunction.

A preliminary injunction is an extraordinary remedy that should be granted with caution. See Potawatomi indian Tribe v. Enter. Management Consultants, 883 F.2d 886, 888 (10th Cir. 1989).

> To obtain a preliminary injunction, the movant must establish that: (1) the moving party will suffer irreparable injury unless the injunction issues; (2) the threatened injury to the moving party outweighs whatever damange the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is substantial likelihood that the moving party will eventually prevail on the merits.

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Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir. 1992). If the first three requirements are satisfied, the "probability of success" factor becomes more lenient. Id., at 1199. In that case, the movant need only show "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." Id., quoting Otero Savings & Loan Ass'n v. Fed. Reserve, 665 F.2d 275, 278 (10th Cir. 1981).

The Court will deny Plaintiff's motion for a preliminary injunction because Plaintiff has failed to establish at least two of the four necessary factors. Most significantly, he has not made a substantial showing that he would likely prevail on the merits of his claim. Plaintiff's claim rests upon the contention that Rule 16-707 violates the First Amendment to the United States Constitution--a contention that does not raise serious, difficult, substantial, or doubtful questions of law. The parties do not dispute that Rule 16-707 regulates commercial speech, nor that the First Amendment protects truthful, non-deceptive

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commercial speech concerning lawful activity. See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980). In Central Hudson, the United States Supreme Court set out a four-part test which governmental restrictions on commercial speech must satisfy in order to be constitutional. Id. at 566. First, the regulated speech must, as noted above, concern lawful activity and not be misleading. Id. Second, the government must establish that the restrictions serve a substantial governmental interest. Id. Third, the government must establish that the restriction directly advance the asserted interest, and finally, the government must establish that the restrictions are "not more extensive than is necessary" to serve that interest. Id. The Court later clarified the fourth part of its analysis, holding that it required only a "reasonable fit" between the restrictions and the asserted governmental interest, not that the restrictions be the least restrictive means available. See Board of Trustees v. Fox, 492 U.S. 469, 480 (1989); City of Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1509-10

(1993). Applying these standards to Rule 16-707, the Court finds that the rule is constitutional. The rule does regulate truthful, non-deceptive commercial speech concerning a lawful activity; however, it serves the substantial governmental interest of preventing, disciplining, and regulating false or misleading attorney advertising. The Rule directly advances that interest, and the Rule is no more extensive than is neceaary to accomplish the interest.

The Supreme Court has not directly considered the constitutionality of a governmental regulation such as Rule 16-707, requiring that attorneys file all published advertisements with a state agency concurrently with or prior to each advertisement's first dissemination. However, the Court has frequently approved such a scheme in majority dicta. For example, in Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988), the Court rejected a comperhensive ban on targeted solicitation letters, but suggessted that the sate could instead "regulate...abuses and minimize mistakes through far less

restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize acutal abuses." Id. at 476. In the earlier case of In re RMJ, 445 U.S. 191 (1982), the Court suggested a similar scheme: "By requiring a filing with the Advisory committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings." 455 U.S. at 206. See also Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 536 (3d Cir. 1988). ("We note that the Supreme Court has repeatedly suggested that in the area of commercial speech, prescreening or prepublication review of advertisements may be constitutionally sound.").

The United States Supreme Court has not addressed the validity of a lawyer advertisement regulation that requires the lawyer to pay a filing fee of $50.00 each time he or she files an advertisement with a state agency. However, applying the standards regulating commerical speech, supra, Plaintiff has

failed to raise serious questions regarding the fee requirement's constitutionality. The statute itself provides the substantial governmental interest that the filing fee serves: "This filing fee shall be used solely to defray the costs of administering rules 16-701 to 16-707," N.M. Stat. Ann. 15-707(D)(4). See, e.g., Kaplan v. County of Los Angeles, 894 F.2d 1076, 1081 (9th Cir.), cert.denied, 496 U.S. 907 (1990) (holding that state interest in avoiding burden on agency budget was substantial). Clearly the fee directly advances the governmental interest; and finally, it is no more excessive than is necessary. While Defendants have offered no evidence of the administrative costs of supervising lawyer advertisements filed under 16-707, neither has Plaintiff alleged that the fee amount is unrelated or disproportionate to such costs. Therefore, Plaintiff has failed to raise a serious question of whether the fee violates the First Amendment.

In addition, Plaintiff has not established that the threatened harm to himself outweighs any harm the proposed

injunction would cause Defendants. The threatened harm to Plaintiff is that he will have to submit his advertisements to the Committee and pay $50.00, concurrently with each advertisement's first dissemination. The Court finds that this harm does not outweigh the harm the proposed injunction may cause Defendants. Defendants assert that if the Court enjoins them from enforcing rule 16-707, they will be "unable to properly assure the public that lawyer advertising is truthful and non-deceptive." Plaintiff has not indicated whether Defendants possess the administrative and financial resources from which to adequately supervise lawyer advertsing if they are unable to use the administrative scheme that Rule 16-707 provides. Plaintiff has not established that the harm he faces outweighs this harm to Defendants should the preliminary injunction issue.

For the above reasons, the court will deny Plaintiff's motion for a preliminary injunction. Plaintiff has not satisfied the four requirements necessary to obtain a preliminary injunction as outlined in Resolution Trust Corp. v. Cruce, 972 F.2d 1195,

1198 (10th Cir. 1992).. Most significantly, Plaintiff has failed to raise serious, substantial, difficult, or doubtful questions concerning the merits of his claim, nor has he substantially shown that he is likely to prevail on the merits.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's May 27, 1994, motion for preliminary injunction be, and hereby is, denied.

DATED this 20th day of March, 1995.

Martha Vasquez
District Judge

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

March 23, 1994

NO. 21,858

In the Matter of
PETER N. MCDEVITT, Esq.

An Attorney Admitted to
Practice Before the Courts
of the State of New Mexico

ORDER

This matter coming on for consideration upon petition to review disciplinary board decision pursuant to SCRA 1710 316(A)(2), and, the Court having considered said petition, having heard oral argument, Virginia Ferrara on behalf of the disciplinary board, Jerry Velarde on behalf of respondent, and respondent Peter M. McDevitt, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the petition to review hereby is DENIED.

BEFORE THE DISCIPLINARY BOARD OF THE

SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

PETER M. MCDEVITT, ESQ.
Disciplinary No. 03-93-231

An Attorney Admitted to Practice
Before the Courts of the State of
New Mexico

DECISION AND RECOMMENDATION OF DISCIPLINARY BOARD

THIS MATTER came before a three member panel of the Disciplinary Board, Michael D. Bustamante, Chair, Freddie J. Romero, Esq., Member and Alex 0. Romero, Member, pursuant to Rule 17-314 of the Rules Governing Discipline. The panel reviewed the transcript of proceedings before the Hearing Committee and all exhibits filed therein. In addition, the panel heard oral argument from the respondent

Peter M. McDevitt, Esq. and Disciplinary Counsel, pursuant to Rule 17-314 of the Rules Governing Discipline. The panel, being fully advised of the circumstances in this matter, finds on behalf of the Disciplinary Board as follows:

1. The Disciplinary Board has jurisdiction over the subject matter and has jurisdiction over the respondent, Peter M. McDevitt, Esq.;
2. The Disciplinary Board hereby adopts the Hearing Committee's Findings of Fact:
3. The Disciplinary Board accepts the Hearing Committee's Conclusion of Law;
4. The Disciplinary Board recommends to the Supreme Court of New Mexico that respondent be disciplined as follows:

A. That respondent be formally reprimanded pursuant to 17-206A(5) of the Rules Governing Discipline, provided, however, that the sanctions

imposed by the Rules Governing Discipline attendant to a formal reprimand under Rule 17-206A(5), including the requirement of Rule 17315B, be deferred pursuant to Rule 17-206B(2) on condition that respondent successfully complete the terms of probation imposed hereafter.

B. That respondent be placed on probation for a period of one (1) year pursuant to Rule 17-206B(2) of the Rules Governing Discipline, with the sole condition of probation being that he file all of his attorney advertisements with the Legal Advertising Committee pursuant to Rule 16707B and further follow all directives of the Legal Advertising Committee to bring his advertisements into compliance with the Rules of Professional Conduct, to the extent such directives are issued.

C. In the event respondent fails to satisfactorily meet the requirements of probation as provided above, the full sanction of formal reprimand pursuant to Rule 17-206A(5) shall attach.

D. That costs of these disciplinary proceedings be assessed against respondent and that respondent pay all costs assessed against him within six months of the date of entry of this decision and recommendation and, further, that payment of such costs shall be deemed a condition of the respondent's probation pursuant to subparagraph B above.

By_____
MICHAEL D. BUSTAMANTE,
Chair

By_____
FREDDIE ROMERO, ESQ.
Member

By_____
ALEX O. ROMERO, ESQ
Member

Advertising Rules
Rules of Professional Conduct

16-707.
Evaluation by legal
advertising committee.

A. **Advisory opinions**. A lawyer may obtain an advisory opinion concerning the compliance of a contemplated advertisement or written communication in advance of disseminating the advertisement or communication by submitting the material and fee specified in Paragraph D of this rule to the legal advertising committee at least thirty (30) days prior to such dissemination. If the commitee finds that the advertisement complies with these rules, the lawyer's voluntary submission shall be deemed to satisfy the filing requirement set forth in Paragraph B. of this rule.

B. **Filing requirements.** Subject to the exemptions stated in Paragraph C of this rule, any lawyer who advertises services through any public media or through written communication involving solicitation shall file a copy of each

such advertisement or revisions thereto with the legal advertising committee for evaluation of compliance with these rules. The copy shall be filed either prior to or concurrently with the lawyer's first dissemination of the advertisement or written communication, and shall be accpanied by the information and fee specified in paragraph D of this rule. Each submission shall have the names of lawyers responsible for the content of the advertisement and the names of those lawyers for whose benefit the advertisement is disseminated.

C. **Exemptions.** Exempt for the filing requirements of Paragraph B of this rule and the record keeping requirements of Paragraph B of rule 16-702 are:

(1) advertisements in any of the public media, including the yellow pages of telephone directories, that contain no illustrations and no information other than that specifically permitted under rule 16-702. This exemption extends to television advertisements only if the visual display featured in such advertisements is limited to the words spoken by the

announcer;

(2) listings or entries in a law list;

(3) newsletters mailed only to exisiting clients or other lawyers;

(4) professional announcement cards stating new or changed associations, new offices and similar changes relating to a lawyer or law firm, and which are mailed only to other lawyers, relatives, close personal friends and existing clients;

(5) documents prepared in connection with a bidding procedure;

(6) firm brochures mailed to a prospective client who requested such a brochure, or with whom a lawyer has a prior personal business or professional relationship;

(7) advertisements in a publication which is primarily subscribed to by other lawyers;

(8) advertisements in a publication or program of a governmental entity or a non-profit organization, if limited to information specifically permitted under Paragraph D of Rule

16-702, and preceded by the words "SPONSORED BY" or other similar words;

(9) notices of an upcoming education seminar or similar presentation which includes information converning participating lawyers or law firms if limited to information specifically permitted under Paragraph D of Rule 16-702 and other information describing qualifications of speakers.

[As amended, effective November 1, 1993.]

D. Contents of filing. A filing with the committee as required by Paragraph B of this rule or as permitted by Paragraph A of this rule shall consist of:

(1) a copy of the advertisement or communication in the form or forms in which it is to be disseminated (e.g. videotapes, audiotapes, print, photographs of outdoor advertisng). Subject to Paragraph H of this rule, advertisements or communications need only be submitted once if the content of the advertisement or communication has not been changed;

(2) a transcript, if the advertisement or communication is

on viewotape or audiotape;

(3) a statement lisiting all media in which the advertisement or communication will appear, the anticipated frequency of use of the advertisement or communication in each medium in which it will appear and the anticipated time period during which the advertisement or communication will be used;

(4) a filing fee of fifty dollars ($50.00) made payable to the Disciplinary Board. This filing fee shall be used solely to defray the cost of administering rules 16-710 to 16-707.

E. Commitee evaluation of advertisements. The committee shall evaluate all advertisements and written communications filed with it pursuant to this rule for compliance with these rules. The commitee shall complete its evaluation within thirty (30) days of receipt of a filing unless the committee determines that there is reasonable doubt that the advertisement or written communication is in compliance with the rules and that further examination is warranted but cannot be completed within the thirty (30) day period, and so advises the lawyer

within the thirty (30) day period. In the latter event, the committee shall complete its review as promptly as the circumstances allow. If the committee does not send any communication to the lawyer within thirty (30) days, the advertisement will be deemed approved.

F. Additional information. If requested to do so by the committee, the filing laywer shall submit information to substantiate representations made or implied in that lawyer's advertisement or written communication.

G. Finding of non-compliance by committee. When the committee determines that an advertisement or written communication is not in compliance with the applicable rules, the committee shall advise the lawyer that dissemination or continued dissemination of the advertisement or written communication may result in professional discipline.

H. Notice of changed circumstances. If a substantial change of circumstances occuring subsequent to the commitee's evaluation of an advertisement or written

communication raises a possiblility that the advertisement or communication has become false or misleading as a result of the change in circumstances, the lawyer shall promptly refile the advertisement or a modified advertisement with the committee along with an explantion of the change in circumstances. No fee shall be charged for such resubmission.

[Adopted, effective August 1, 1992.]